

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BRENDA WHITE,

Plaintiff-Appellant,

v

SOUTHEAST MICHIGAN SURGICAL  
HOSPITAL and DR. GARY DOCKS

Defendants-Appellees.

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UNPUBLISHED

January 23, 2014

No. 312159

Macomb Circuit Court

LC No. 2012-002017-NH

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order dismissing her medical-malpractice claim against defendants, Dr. Gary Docks (Dr. Docks) and Southeast Michigan Surgical Hospital (SMSH). We affirm.

**I. BASIC FACTS**

In April 2007, plaintiff went to Dr. Docks, a board-certified podiatrist, for treatment of her broken ankle. Dr. Docks performed surgery on April 27, 2007. A follow-up surgery was required on July 23, 2007. During the July surgery, Dr. Docks removed a screw that he had placed in plaintiff's ankle during the April surgery and also performed a gastrocnemius recession. Both surgeries were performed at SMSH. Dr. Docks was not an employee of SMSH, but he had staff privileges at SMSH for purposes of conducting podiatric surgery.

On May 3, 2012, nearly five years after the July surgery, plaintiff attempted to file a medical-malpractice complaint against SMSH and Dr. Docks. She amended her complaint on May 7, 2012. A review of both complaints indicates that plaintiff did not complain of any injury or damage to her ankle or leg as a result of either surgery performed by Dr. Docks. Both complaints also failed to allege any wrongdoing on the part of SMSH. Instead, plaintiff asserted that during the July surgery she had suffered "a compression injury to the nerves [as a result of the] laryngotracheal mask" used during the anesthesia process, and that this injury "caused her hearing loss and tightness to her throat, difficulties in swallowing food and ongoing pai[n]."

Plaintiff did not provide a notice of intent (NOI) to SMSH or Dr. Docks before filing either complaint. In addition, while plaintiff filed a document entitled "Affidavit of Merit" on May 3, 2012, the document was not completed, was not signed, and was not notarized.

Plaintiff attempted to serve her original complaint on Dr. Docks and SMSH by registered mail, sending two copies to SMSH. While she sent Dr. Docks's copy restricted delivery, the record reveals that both copies were received by an employee of SMSH. Plaintiff did not attempt personal service on either defendant. Nor did she send a copy of either complaint to SMSH's registered agent. The amended complaint was also sent to SMSH. However, the amended complaint was sent via ordinary mail. At the time the complaints were mailed to SMSH, Dr. Docks was not providing any medical treatment at the hospital. Nor did he provide medical treatment at SMSH any time thereafter according to the affidavit of Yvonne Kughn, the hospital's chief executive officer.

As of June 19, 2012, neither defendant had filed an answer to either complaint. Accordingly, plaintiff filed a one-page motion for default judgment against both defendants, seeking a \$4,000,000 judgment. No default had been entered by the clerk at that time.<sup>1</sup> Plaintiff mailed a copy of her motion for default judgment to SMSH. The motion was delivered to Kughn, and it was the first time that any management-level employee of SMSH had become aware of the lawsuit. Kughn immediately took steps to locate the complaint; the complaint was forwarded to the appropriate individuals and an answer was filed on behalf of SMSH on June 28, 2012.

Plaintiff's motion for default judgment was denied by the trial court on July 6, 2012. SMSH opposed the motion, arguing that no default had ever been entered. SMSH also included an affidavit providing good cause and meritorious defenses. The trial court denied plaintiff's motion, explaining that plaintiff had failed to ensure the entry of a default and that no notice of entry of default was ever served. Following the denial of plaintiff's motion for default judgment, Dr. Docks filed his answer and affidavits of meritorious defense.

SMSH filed two motions to dismiss. SMSH first argued that plaintiff's lawsuit should be dismissed because plaintiff had failed to send a pre-suit NOI under MCL 600.2912b. SMSH further argued that dismissal was required because plaintiff had failed to serve and file an affidavit of merit as required by MCL 600.2912d. Dr. Docks concurred in SMSH's first motion. In opposing the motion, plaintiff argued, without citing any legal authority, that a pre-suit NOI was not needed. She conceded that the affidavit of merit was not signed or notarized, but argued, again without citing any legal authority, that this should be excused because she had provided "a lot of medical records." Explaining that a pre-suit NOI and affidavit of merit are both required when filing a medical-malpractice action, the trial court granted SMSH's motions and dismissed plaintiff's case in its entirety.

Plaintiff appeals this dismissal, arguing that because defendants did not timely answer the complaint or amended complaint, both a default and default judgment should have been entered.

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<sup>1</sup> Plaintiff claims on appeal that the clerk refused to enter a default. However, she did not make that argument to the trial court at the time of the hearing on her motion for default judgment and the lower court file does not contain any entry of default.

## II. STANDARDS OF REVIEW

We review de novo the trial court's decision regarding a motion to dismiss. *Cork v Applebee's of Michigan, Inc.*, 239 Mich App 311, 315; 608 NW2d 62 (2000). We also review de novo issues of law, including statutory interpretation. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010). We review for an abuse of discretion the entry of default and the trial court's grant or denial of a default judgment. See *Amco Builders & Developers, Inc. v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003); *Huntington Nat Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). An abuse of discretion occurs when the decision falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

## III. DISCUSSION

It is undisputed that plaintiff never provided a pre-suit NOI to SMSH or Dr. Docks before filing her lawsuit. "Pursuant to MCL 600.2912b, a medical malpractice suit cannot be commenced unless the plaintiff first provides to health professional or health facility defendants a written notice of intent to commence suit and then waits 182 days before filing the complaint." *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208, 220; \_\_\_ NW2d \_\_\_ (2013); see also *Burton v Reed City Hosp Corp*, 471 Mich 745, 751; 691 NW2d 424 (2005). Indeed, "the failure to comply with the statutory requirement renders the complaint insufficient to commence the action." *Id.* at 754. Because it is undisputed that plaintiff never served SMSH or Dr. Docks with a pre-suit NOI, the trial court properly dismissed plaintiff's lawsuit.

The trial court also properly dismissed plaintiff's lawsuit on the basis of her failure to file and serve a signed and notarized affidavit of merit in conformity with MCL 600.2912d. In *White v Busuito*, 230 Mich App 71, 76; 583 NW2d 499 (1998), this Court held that the filing of an "affidavit of meritorious claim is an absolute prerequisite to the defendant's obligation to answer or otherwise defend the action." Plaintiff attempts to rely on *Saffian v Simmons*, 267 Mich App 297; 704 NW2d 722 (2005), aff'd 477 Mich 8 (2007), for the proposition that dismissal was not warranted on the basis of the defects in her affidavit of merit. But we find her argument unpersuasive. The document prepared by plaintiff did not constitute an affidavit at all because it was not confirmed by oath or affirmation and not even signed. *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000). The trial court properly dismissed plaintiff's claims.

In light of our foregoing conclusions, we need not address the remaining arguments raised by plaintiff on appeal.

Affirmed. Defendants, having prevailed on appeal, may tax costs pursuant to MCR 7.219.

/s/ Patrick M. Meter  
/s/ Kathleen Jansen  
/s/ Kurtis T. Wilder